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IN THE

Supreme Court of the United States

October Term, 1968

No. 380

ANDREW DYMYTRYSHYN, *et al.*,

Appellants,

v.

P. A. ESPERDY, District Director of the New York District of the Immigration & Naturalization Service at New York, N. Y.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK.

JURISDICTIONAL STATEMENT

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P. A. ESPERDY, District Director of the New York District of the Immigration & Naturalization Service at New York, N.Y.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

JURISDICTIONAL STATEMENT

Andrew Dymytryshyn, Alexander Bittelman, Betty Gannett Tormey, Rose Lightcap Raynes, Lena Scherer and Felix Kusman, appellants, having appealed from the final judgment of a three-judge court of the United States District Court for the Southern District of New York granting summary judgment for appellee on the constitutional issues before the court, and denying appellants' motion for summary judgment on these issues, submit this statement to show that the Supreme Court of the United States has jurisdiction of this appeal and that a substantial question is presented.

Opinions Below

The opinions below (R. 22; 23; 26;[1] Appendix, *infra*) have not yet been officially reported.

Jurisdiction

Appellants, resident aliens who are the subject of unexecuted deportation orders, brought this action in the United States District Court for the Southern District of New York for a declaratory judgment and an injunction against enforcement of orders for their supervision issued by appellee under section 242(d) of the Immigration and Nationality Act, 8 U.S.C. 1252(d) (the Statute). Relief was sought on the grounds both that the Statute is unconstitutional and that it does not authorize the restraints on appellants' liberty prescribed by the orders of supervision. The action was brought under 8 U.S.C. 1329, 5 U.S.C. 702-06, 28 U.S.C. 2282 and 28 U.S.C. 2284. (R. 5.)

A three-judge court was convened and heard appellants' motion and appellee's cross-motion for summary judgment. On June 12, 1968, the court filed an opinion holding that it "was properly convened upon a reading of the complaint and the determination that the constitutional questions raised were substantial." The opinion proceeded to direct summary judgment for appellee "on the constitutional issues," to deny "[p]laintiffs' motion for summary judgment on these issues," to remand the case to the member of the court to whom it had been initially assigned "for determination as to the propriety of the supervision orders," and to direct the entry of judgment accordingly. (R. 22, pp. 4, 8; *infra*, pp. 15, 17-18.)

On the same day, the district judge to whom the case was remanded filed an opinion deciding the non-constitu-

[1] The record is cited by document number followed, where appropriate, by the page number of the document referred to.

tional issue adversely to appellants and directing the entry of judgment "dismissing plaintiffs' complaint in its entirety" (R. 23, pp. 4-5; *infra*, p. 20).

Appellants moved for a rehearing, for decision of the non-constitutional issue by the three-judge court, and for alteration of the judgments accordingly (R. 24). The motion was denied on July 8, 1968 (R. 26; *infra*, pp. 21-22).

The judgment directed by the three-judge court opinion of June 12, 1968, was entered July 16, 1968 (R. 22, p. 8; *infra*, p. 18).[2] The notice of appeal from that judgment was filed July 17, 1968 (R. 28).

The refusal of the three-judge court to decide the non-constitutional question presented by appellants was plainly erroneous.[3] However, in the interest of expedition and to remove any doubt as to the Court's jurisdiction to dispose of the case on the merits, appellants have abandoned their non-constitutional contention.[4] With that issue out of the case, the judgment of the three-judge court on the constitutional issues is an order denying appellants an injunction, and is appealable under 28 U.S.C. 1253. *Idlewild Liquor Corp.* v. *Epstein*, 370 U.S. 713; *Florida Lime Growers* v. *Jacobsen*, 362 U.S. 73.

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[2] By oversight of the clerk, judgment was not entered at the time the opinion was filed.

[3] Since the criteria for convening a three-judge court were met, "the applicable jurisdictional statute therefore made it impermissible for a single judge to decide the merits of the case." *Idlewild Liquor Corp.* v. *Epstein*, 370 U.S. 713, 715. Appellants' objections to the procedure adopted below are spelled out in their motion for rehearing (R. 24).

[4] Appellants are not appealing the judgment of the single judge to the Court of Appeals, and their notice of appeal to this Court (R. 28) is confined to the constitutional questions.

Statute and Regulation Involved

Section 242(d) of the Immigration and Nationality Act, 8 U.S.C. 1252(d), 68 Stat. 1232, provides as follows:

> Any alien against whom a final order of deportation as defined in subsection (c) of this section heretofore or hereafter issued has been outstanding for more than six months, shall, pending eventual deportation, be subject to supervision under regulations prescribed by the Attorney General. Such regulations shall include provisions which will require any alien subject to supervision (1) to appear from time to time before an immigration officer for identification; (2) to submit, if necessary, to medical and psychiatric examination at the expense of the United States; (3) to give information under oath as to his nationality and circumstances, habits, associations and activities, and such other information, whether or not related to the foregoing, as the Attorney General may deem fit and proper; and (4) to conform to such reasonable written restrictions on his conduct or activities as are prescribed by the Attorney General in his case. Any alien who shall willfully fail to comply with such regulations, or willfully fail to appear or to give information or submit to medical or psychiatric examination if required, or knowingly give false information in relation to the requirements of such regulations, or knowingly violate a reasonable restriction imposed upon his conduct or activity, shall be fined not more than $1,000 or, imprisoned not more than one year, or both.

8 C.F.R. 242.2(d) provides:

> *Supervision.* Until an alien against whom a final order of deportation has been outstanding for more than six months is deported, he shall be subject to supervision by a district director, acting district director, or deputy district director, and required to comply with the provisions of section 242(d) of the Act relating to his availability for deportation.

Question Presented

Whether the Statute is unconstitutional on its face or as applied to appellants.

Statement of the Case

The Statute, as implemented by 8 C.F.R. 242.2(d), authorizes the appellee to issue orders for the supervision of aliens against whom final orders of deportation have been outstanding for more than six months. The wilful violation of an order is punishable by imprisonment for one year and a fine of $1,000.

The relevant facts are not in dispute.

Appellants are aliens who were admitted to the United States for permanent residence many years ago and who have resided here ever since. Each appellant is subject to a final order of deportation, issued pursuant to section 241(a)(6)(C)(i) of the Immigration and Nationality Act (the Act), as an alien who, sometime after entry, was a member of the Communist Party of the United States.[5] Each appellant is also subject to an order of supervision issued by the appellee and subsequently amended by him. (R. 23, p. 2; *infra*, p. 19.)

Pertinent facts with respect to each appellant are shown in the following table (*ibid.*).

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[5] Proceedings by appellant Tormey challenging the constitutionality of section 241(a)(6)(C)(i) are before the Court on her petition for certiorari. *Tormey* v. *Immigration & Naturalization Service*, No. 122, this term. A decision there that the statute under which appellants were ordered deported is unconstitutional would, of course, render the present case moot.

	Year Admitted	Age at Admission	Order of Deportation	Order of Supervision	Present Age
Dymytryshyn	1915	23	1951	1952	76
Bittelman	1912	22	1952	1957	78
Tormey	1914	8	1952	1953	62
Lightcap	1913	10	1951	1952	65
Scherer	1913	13	1958	1959	68
Kusman	1939	30	1953	1954	59

The U.S.S.R., which now includes the countries of origin of all the appellants but Tormey, does not recognize them as citizens and refuses to admit them. Poland, Tormey's country of origin, takes the same position with respect to her. The Service has been unable to effect the deportation of appellants to any other country. (R. 11, pp. 2-4.) As the district judge below found, "there does not appear to be any reasonable chance in the foreseeable future" of deporting appellants (R. 23, p. 3; *infra*, p. 20).

The orders of supervision in effect at the commencement of this proceeding, among other things, (1) prohibited appellants from travelling outside the New York Immigration District (the State of New York) for more than 48 hours without first having notified the Immigration and Naturalization Service of the dates and places of the proposed travel, and (2) required appellants to report in person at the district office of the Service on a specified day of the week at three month intervals (R. 11, p. 2; R. 9, exhibits annexed to affidavits).

At the suggestion of the court below on the argument, the appellee modified the orders of supervision. As modified, they add New Jersey and Connecticut to New York as states where appellants are free to travel, and prohibit travel elsewhere for more than 72 hours without notification to the Service of the dates and places of the proposed travel not later than 72 hours after departure. The modified orders also reduce the personal reporting requirement from four times to once a year. (R. 23, pp. 2-3; *infra*, p. 19.)

In the court below, appellants sought injunctive and declaratory relief against the orders of supervision on the following grounds:

1. Because of the improbability that the orders of deportation can ever be executed, and in view of appellants' ages, family ties and economic circumstances, the personal reporting and travel-notice requirements of the orders of supervision, both in their original form and as modified after argument, are not reasonably required to assure the the availability of appellants for deportation. Hence these requirements are not authorized by the Statute as construed in *United States* v. *Witkovich,* 353 U.S. 194. (R. 12, pp. 2-6; R. 19.)

2. The Statute is unconstitutional, on its face and as applied.

(a) The Statute deprives the accused in a prosecution for violating an order of supervision of a jury trial on the issue of his deportability. It likewise denies him the benefit of the requirement of proof of deportability beyond a reasonable doubt. In these respects, the Statute violates the Sixth Amendment and procedural due process. (R. 12, pp. 16-11.)

(b) The Statute, as applied to appellants, is a bill of attainder (R. 12, pp. 12-13).

(c) The Statute, if construed to authorize the orders of supervision, denies appellants substantive due process by imposing arbitrary restraints on their liberty (R. 12, pp. 11-12).

Appellants recognize that abandonment of their nonconstitutional contention (point 1 above) entails abandonment of its constitutional corollary (point 2(c)). Accordingly, in this Court, the issues are confined to those stated in points 2(a) and 2(b) above.

The Questions Are Substantial

1. Denial of jury trial and the benefit of reasonable doubt.

The Statute punishes violation of an order of supervision by fine and imprisonment. Under the Statute, an individual is not, and under the Constitution he cannot be, subject to an order of supervision unless he is a deportable alien. Hence the deportability of the accused is an element of the offense of violating such an order. Yet this element is not submitted to the jury. Nor need it be proved beyond reasonable doubt.

Instead, the Statute makes the existence of a final order of deportation conclusive on the issue of deportability unless the accused, at his criminal trial, elects to challenge the validity of the order pursuant to section 106(a)(6) of the Act. All that the challenge gets him, however, is a *bench* trial on the issue of alienage and, if that is established, review by the trial judge of the administrative record to determine whether the order was supported by "reasonable, substantial and probative evidence."[6]

By withdrawing the issue of deportability from the jury and dispensing with the requirement that it be proved beyond a reasonable doubt, the Statute violates the Sixth Amendment and due process. *United States* v. *Spector*, 343 U.S. 169, 174-80 (dissenting opinion of Justice Jackson); *Wong Wing* v. *United States*, 163 U.S. 228; *United States* v. *England*, 347 F. 2d 425, 438-43; *Maggio* v. *Zeitz*, 333 U.S. 56, 78-79 (opinion of Justice Black); *Aptheker* v. *Secretary of State*, 378 U.S. 500, 518 (concurring opinion of Justice Black); Fraenkel, Can the Administrative Process Evade the Sixth Amendment? 1 Syracuse L. Rev. 173.

United States v. *Spector, supra,* involved an indictment under section 242(e) of the Act, making it a crime for an alien against whom a final order of deportation is outstand-

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[6] This standard falls short of the requirement in a criminal case of proof beyond a reasonable doubt. *Woodby* v. *Immigration & Naturalization Service*, 385 U.S. 276, 284-86.

ing to fail to take steps to effectuate his departure. That section is identical with the Statute in its treatment of the issue of deportability. The majority in *Spector* declined to decide whether the section was unconstitutional on this account, but reserved the question since counsel had not raised it.

Justice Jackson, joined by Justice Frankfurter, in a dissenting opinion with which Justice Black (at 174, n. 2) expressed full agreement, held that the statute was unconstitutional, stating (at 177-78):

> "We must not forget that, while the alien is not constitutionally protected against deportation by administrative process, he stands on an equal footing with the citizen when he is charged with crime. If Congress can subdivide a charge against an alien and avoid jury trial by submitting the vital and controversial part of it to administrative decision, it can do so in the prosecution of a citizen. And if vital elements of a crime can be established in the manner here attempted, the way would be open to effective subversion of what we have thought to be one of the most effective constitutional safeguards of all men's freedom."

The *Spector* majority, in reserving the question dealt with by Justice Jackson, noted (at 172-73), "cf. *Yakus* v. *United States,* 321 U.S. 414; *Cox* v. *United States,* 332 U.S. 442." These cases are distinguishable, as is evident from the fact that Justices Jackson, Frankfurter and Black joined or concurred with the majority in both.

Yakus held that a statute may constitutionally impose criminal penalties for violation of an administrative regulation (there, a maximum price order) without requiring submission of the issue of its validity to the jury. This principle applies to administrative *rules* of general application for the regulation of future conduct. It does not apply, as Justice Jackson pointed out (*Spector* at 179), to administrative *adjudication* of the past conduct of specific persons.

Cox held that the accused in a prosecution for refusal to report for induction is not entitled to a jury trial on

the issue of his classification. The draft cases, however, are *sui generis*. Since Congress may require military service of all, exemptions are acts of grace which may be granted on such conditions as it chooses to exact. *Hamilton* v. *Board of Regents*, 293 U.S. 245, 266-67 (concurring opinion).

The three judge court below found the jury trial question substantial (R. 22, p. 4) in deference to *Siminoff* v. *Esperdy*, 267 F. 2d 705 (C.A. 2), which had so held in a proceeding to enjoin enforcement of provisions of earlier orders of supervision issued by appellee.[7] However, the court below did not decide the question, but dismissed it as premature because (R. 22, p. 5) "these plaintiffs have neither violated their supervision orders . . . nor asserted any immediate intention of doing so." *Infra*, p. 15.

But to require these elderly appellants to risk a year in jail as the price of litigating their claimed deprivation of constitutional rights would effectively deny them judicial consideration of their claim.

The decision below is contrary to *Barton* v. *Sentner*, 353 U.S. 963, affirming *Sentner* v. *Colarelli*, 145 F. Supp. 569, and to *Siminoff* v. *Esperdy*, *supra*. In both, the enforcement of challenged provisions of orders of supervision was enjoined as unauthorized by the Statute at the suit of aliens who had neither violated nor threatened to violate the orders. If those proceedings were not premature, appellants' challenge to the orders of supervision on constitutional grounds is likewise ripe for adjudication.[8]

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[7] *Siminoff*, reversing a single district judge, enjoined enforcement of the challenged provisions of the orders on the ground that they were unauthorized, but did not pass on the constitutional question for lack of jurisdiction.

[8] It should be noted that the enactment subsequent to the decision in *Spector* of section 106(a)(6) of the Act (*supra*, p. 8) has rendered inapposite the statement of the majority in that case (at 172) that, "It will be time to consider whether the validity of the order of deportation may be tried in the criminal trial either by the court or by the jury when and if the appellee seeks to have it tried" (citations omitted).

In this respect, the decision below of the three judge court is inconsistent with that of the single judge. For the latter did not dismiss appellants' non-constitutional contention as premature, but adjudicated it on the merits (R. 23, pp. 3-4; *infra*, p. 20).

"To relegate the parties to another time and place in order to raise these constitutional objections is to fashion an extremely harsh rule to fit the Communist Party but no one else. Default means the risk of criminal prosecution. No person, I think, should be forced to wait until his default to raise his constitutional objection . . . Never before, I believe have we forced that choice on a litigant." *Communist Party* v. *S.A.C.B.*, 367 U.S. 1, 189 (dissenting opinion of Justice Douglas). Cf. *Yakus* v. *United States*, 321 U.S. 414, 437-38 and cases there cited; *United Steel Workers* v. *Bagwell*, 383 F. 2d 492; *Heckler* v. *Shepard*, 243 F. Supp. 841.

Plainly, both the question of prematurity and the underlying constitutional question are substantial and merit plenary consideration.

2. Attainder.

Appellants were ordered deported pursuant to section 241(a)(6)(C)(i) of the Act which provides for the deportation of aliens who, after entry, were members of the Communist Party.

But for the rule of *Galvan* v. *Press*, 347 U.S. 522, 531, that deportation does not constitute punishment, this section would be invalid as a bill of attainder. *United States* v. *Brown*, 381 U.S. 437. Appellants believe that *Galvan* v. *Press* has lost its authority for the reasons stated in the petition for certiorari in *Tormey* v. *Immigration & Naturalization Service*, *supra*, at pp. 13-14.

But assuming that the rule of *Galvan* still prevails, it is inapplicable here. For the Statute, which makes wilful violation of an order of supervision a crime, undeniably

does inflict punishment. Appellants are subject to punishment under the Statute only because they were ordered deported as members of the Communist Party. Thus the Statute imposes punishment upon them on account of such membership. Such legislation is a bill of attainder. *United States* v. *Brown, supra.*

The court below (R. 22, p. 7; *infra,* p. 17), reading the Statute as a discrete enactment, said that "the class defined is that of all deportable aliens." But the Statute is only one element in a statutory scheme of which section 241(a)(6)(C)(i) forms an integral part. Appellants would not be liable to punishment under the Statute had they not been found to have been members of the Communist Party. Hence Communist Party membership is no less relevant to the punishment of appellants under the Statute than it was to the punishment of the accused in *United States* v. *Brown, supra,* under section 504 of the Landrum-Griffin Act.

Like section 504, therefore, the statutory scheme of which the Statute is a part violates the principle that Congress must accomplish its objectives by "rules of general application" and "cannot specify the people upon whom the sanction it prescribes is to be levied." *Brown,* at 461.

CONCLUSION

Probable jurisdiction should be noted.

Respectfully submitted,

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APPENDIX

Opinions and Judgment Below

1. Opinion and Judgment of Three-Judge Court

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

66 Civ. 2375

ANDREW DYMYTRYSHYN, et al.,

Plaintiffs,

against

P. A. ESPERDY, District Director of the New York District of the Immigration and Naturalization Service at New York, N. Y.,

Defendant.

(Filed June 12, 1968)

Appearances:

JOHN J. ABT and IRA GOLLOBIN, of New York, N. Y., Attorneys for Plaintiffs.

ROBERT M. MORGENTHAU, United States Attorney, Southern District of New York, Attorney for Defendant;

FRANCIS J. LYONS, Special Assistant United States Attorney, Southern District of New York, Of Counsel.

Before KAUFMAN, Circuit Judge, and
METZNER and POLLACK, District Judges.

METZNER, *D. J.*:

Plaintiffs, against whom final orders of deportation have been entered, seek a declaratory judgment and injunctive relief against the orders of supervision issued by the defendant. It is their contention that the statutory provisions under which these orders were issued are violative of the Fifth and Sixth Amendments and the bill of attainder clause in Article I, § 9, of the Constitution. They further contend that the provisions of the orders of supervision are not reasonably related to the availability of plaintiffs for deportation and are therefore not authorized by § 242(d) of the Immigration and Nationality Act (8 U.S.C. § 1252 (d)). Both parties move for summary judgment.

§ 242(d) provides that if a final order of deportation has been outstanding against an alien for more than six months the Attorney General shall prescribe regulations for the supervision of such aliens. A wilful failure to comply with an order issued pursuant to such regulations subjects the alien to criminal sanctions of fine and imprisonment.

Two plaintiffs were ordered deported in 1951, two in 1952, one in 1953 and one in 1958. Each order was based on a finding that the individual was an alien who after entry into the United States had been a voluntary, knowing member of the Communist Party. The validity of these orders of deportation is not challenged in this proceeding.

The Service has been unable to effect the deportation of the plaintiffs and they have thus been subjected to the orders of supervision as provided in § 242(d).

Judicial review of the order of deportation is limited to the administrative record and the order is conclusive "if supported by reasonable, substantial and probative evidence on the record considered as a whole." § 106(a)(4) and (6). Review is had either by petition to the Court of Appeals (§ 106(a) and 28 U.S.C. § 2341 et seq.) or if such review has not been sought, then by motion in a criminal

proceeding against an alien charged with violation of a supervision order (§ 106(a)(6)). Such motion must be heard and determined by the court before a jury trial of the criminal charge.

On an earlier application by some of these plaintiffs, the Court of Appeals ordered that a provision of the then existing orders of supervision be modified, but reserved for a three-judge district court under 28 U.S.C. § 2282 the claimed unconstitutionality of § 242(d) "in that it imposes criminal sanctions on an alien's failure to comply with orders designed to further his deportation, but does not require the United States to prove at the criminal trial the alien's deportability." *Siminoff* v. *Esperdy*, 267 F.2d 705, 707 (2d Cir. 1959).

Following the suggestion of the Court of Appeals, this action was instituted and on motion made by plaintiffs and concurred in by the defendant a three-judge court was convened.

The three-judge court was properly convened upon a reading of the complaint and the determination that the constitutional questions raised were substantial. *Idlewild Liquor Corp.* v. *Epstein*, 370 U.S. 713 (1962). However, after reviewing the case on the merits, we have come to the conclusion that the plaintiffs presently before us lack the requisite standing and ripeness to precipitate the adjudication of the constitutional issues raised. The provision they attack is essentially a rule of criminal procedure, establishing a standard of proof and delineating the jury's province in prosecutions for violation of supervision orders. Yet these plaintiffs have neither violated their supervision orders, which have been in effect for many years, nor asserted any immediate intention of doing so. There is no immediate threat of prosecution. Any criminal prosecutions against them are purely hypothetical. Cf. *Evers* v. *Dwyer*, 358 U.S. 202 (1958). To grant plaintiffs standing to raise this question would open any rule of criminal pro-

cedure to attack by anyone, on the theory that a hypothetical criminal prosecution against him might someday be governed by such rule. Clearly, a more immediate interest is required.

Plaintiffs' reliance upon such cases as *Dombrowski* v. *Pfister,* 380 U.S. 479 (1965); *United Steelworkers* v. *Bagwell,* 383 F.2d 492 (4th Cir. 1967), and *Heckler* v. *Shepard,* 243 F. Supp. 841 (D. Idaho 1965), is misplaced for two reasons. First, in each of those cases there was a proposed form of conduct which was inhibited or a prosecution threatened that affected First Amendment freedoms. The doctrine of "chilling effect" enunciated in *Dombrowski* has not been extended to situations like the present one in which the plaintiffs neither propose acts which might violate a criminal statute nor have been subjected to actual threat of prosecution—the injury is a mere possibility, a speculation. See Note, Declaratory Relief in the Criminal Law, 80 Harv. L. Rev. 1490, 1506 and 1508 (1967). Second, and more important, the plaintiffs in all of those cases were attacking the constitutionality of statutes which directly regulated their conduct. Here, the plaintiffs do not dispute the right of the Attorney General to regulate their conduct by issuing supervision orders nor his right to prosecute them for violations of such orders. They attack only the procedure which would be used if they were prosecuted. Even if the doctrine of *Dombrowski* is extended, it is doubtful that the procedure authorized by § 106(a) alone adds substantially to any chilling effect on plaintiffs' enjoyment of their rights. We hold that the constitutional attack on § 242(d) is not ripe for adjudication upon the motion of these plaintiffs.

The plaintiffs also assert that § 242(d) constitutes a bill of attainder as applied to them, since it imposes criminal sanctions upon deportable aliens and they have been found deportable solely because of their past membership

in the Communist Party. Even assuming that this assertion is properly presented to us, because it attacks the criminal prescription itself, we cannot accept it on the merits. Plaintiffs rely on *United States* v. *Brown,* 381 U.S. 437 (1965), which held a provision imposing criminal sanctions upon labor union officials who were Communist Party members to be a bill of attainder. But the rule of *Brown* is not sufficiently broad to reach this case. There, the specification of Communists in the statute served only the function of defining those who were charged with a crime. In the present case, the class defined is that of all deportable aliens and a specific act in violation of admittedly valid orders is required before criminal sanctions are imposed. The reason for deportability is not in issue in such a proceeding. What plaintiffs really attack here is the determination of deportability premised solely upon party membership, an argument already rejected by the Supreme Court. *Galvan* v. *Press,* 347 U.S. 522 (1954).

Since we have rejected both of plaintiffs' constitutional arguments, we are presented with the question of the proper disposition of plaintiffs' non-constitutional challenge to the scope of the supervision orders. We think this issue should be determined by the single judge who convened this court. The three-judge court statutes must be read "not as a measure of broad social policy to be construed with great liberality, but as an enactment technical in the strict sense of the term and to be applied as such." *Phillips* v. *United States,* 312 U.S. 246, 251 (1941). Cf. *Swift & Co.* v. *Wickham,* 382 U.S. 111 (1965). The Supreme Court has not favored bypassing review by the Court of Appeals and we see no reason in the policies behind § 2282 why plaintiffs should have direct immediate review by the Supreme Court on the issue of the validity of the supervision orders.

Accordingly, we grant summary judgment for the defendant on the constitutional issues before the three-judge

court for the reasons stated, and remand to the single judge for determination as to the propriety of the supervision orders. Plaintiffs' motion for summary judgment on these issues is denied. Judgment will be entered accordingly.

It is so ordered.

Dated: New York, N. Y.
June 12, 1968

/s/ IRVING R. KAUFMAN
U. S. C. J.

/s/ CHARLES M. METZNER
U. S. D. J.

/s/ MILTON POLLACK
U. S. D. J.

Judgment entered 7-16-68.

/s/ JOHN J. OLEAR, JR.
Clerk

2. Opinion of District Judge

(Filed June 12, 1968. Caption and Appearances omitted.)

METZNER, D. J.:

This matter was argued before a statutory three-judge court whose opinion on the constitutional issues raised has been filed simultaneously with this opinion. That court reserved the disposition of the nonconstitutional issue for the single judge before whom the original application for a statutory court had been made.

The question presented is whether the reporting and travel notice requirements of the supervision orders are reasonably related to the availability of the plaintiffs for deportation. *United States* v. *Witkovich,* 353 U.S. 194 (1957).

The pertinent information regarding each plaintiff is as follows:

	Year Admitted	Age at Admission	Order of Deportation	Order of Supervision	Present Age
Dymytryshyn	1915	23	1951	1952	76
Bittelman	1912	22	1952	1957	78
Tormey	1914	8	1952	1953	62
Lightcap	1913	10	1951	1952	65
Scherer	1913	13	1958	1959	68
Kusman	1939	30	1953	1954	59

On the argument before this court of the motions for summary judgment, inquiry was made of the defendant as to whether modifications could not be made in the existing orders of supervision. As a result, the orders were amended to provide that a plaintiff shall not travel outside New York, New Jersey and Connecticut for a period in excess of 72 hours without notifying the Immigration Service within 72 hours after the journey commences of the dates

and places of proposed travel. Each plaintiff need report personally only once each year.

Plaintiffs have advised the court that the orders of supervision as amended are not satisfactory and they press their motions for summary judgment.

§ 242(d) of the Immigration and Nationality Act (8 U.S.C. § 1252(d)), as amended, provides that an alien, subject to a final order of deportation unexecuted for more than six months, shall be subject to supervision under regulations prescribed by the Attorney General. The statute specifically refers to the inclusion in the regulations of provisions for reporting to the Immigration Service and for reasonable written restrictions on the alien's conduct or activities.

Although the Service has not been able to effect deportation for a long period of time, and there does not appear to be any reasonable chance in the foreseeable future, this of itself cannot void the orders of supervision. The statutory duty to deport still exists and the defendant must be in a position to comply with the mandate when and if the opportunity presents itself. On the other hand, since a lifetime of surveillance may be the prospect in these cases, the orders of supervision must be carefully reviewed. *Sentner* v. *Barton*, 353 U.S. 963 (1957); *United States* v. *Witkovich*, *supra*.

The provision for personal reporting once a year is not a burdensome or unreasonable requirement. Complete freedom of travel by the aliens without reporting is permitted within the state of residence, New York, and the two adjoining states of New Jersey and Connecticut. It is only when travel of more than 72 hours' duration is intended outside this area that reporting is necessary, and then only within 72 hours after commencing such travel.

Thus plaintiffs may respond to emergent situations without fear of violating orders. On the other hand, long trips require time to return to New York and time for adequate notice to report to the Service must be made. The orders of supervision are reasonable.

The plaintiff's motion for summary judgment is denied. Judgment shall be entered dismissing plaintiffs' complaint in its entirety. Settle order containing the terms of the supervision orders as modified after argument.

So ordered.

Dated: New York, N. Y.
June 12, 1968.

/s/ CHARLES M. METZNER,
U. S. D. J.

3. Opinion on Motion for Rehearing

(Filed July 8, 1968. Caption omitted.)

Before:

KAUFMAN, *Circuit Judge,* and
METZNER and POLLACK, *District Judges.*

METZNER, *D. J.*:

The motion for a rehearing and to alter the judgments entered herein on June 12, 1968 is denied. While the recent Supreme Court cases cited by plaintiffs indicate that a three-judge court once convened under 28 U.S.C. § 2282 has jurisdiction to decide nonconstitutional claims, none holds that in every case such jurisdiction must be exercised. The claim attacking the reasonableness of the supervision orders does not require a three-judge court. It seeks separate and distinct relief from that sought under the constitutional claim, rather than serving merely as alternative grounds for the same relief. In such circumstances, the three-judge court has discretion to remand such a claim to a single judge. See 3A Moore, Federal Practice ¶ 18.07[2] and cases cited therein.

The court's disposition does not deny plaintiffs appellate review. Nothing in *Siminoff* v. *Esperdy,* 267 F.2d 705 (2d Cir. 1959), requires that in order to appeal the single judge's determination herein to the Court of Appeals the plaintiffs must forego appeal of the three-judge court's decision, or vice versa.

Finally, plaintiffs argue that bifurcation of the questions raised herein has eliminated consideration by the three-judge court of their additional constitutional claim that if the supervision orders are held to be valid under § 242(d) of the Immigration and Nationality Act (as they have been), then the statute violates due process. Plaintiffs never had any right to such adjudication by three judges, as that particular constitutional claim was never found to be substantial. The only constitutional claim

found to be substantial was the one directed to the lack of necessity of jury consideration of the alien's deportability. The claim that § 242(d) constituted a bill of attainder was disposed of on an assumption that the claim was properly presented to the three-judge court. We can assume that the single judge, in passing on the supervision orders, considered and rejected the claim that § 242(d) violated due process.

So ordered.

Dated: New York, N.Y.
July 8, 1968

/s/ IRVING R. KAUFMAN
U. S. C. J.

/s/ CHARLES M. METZNER
U. S. D. J.

/s/ MILTON POLLACK
U. S. D. J.

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No. 380

In the Supreme Court of the United States

OCTOBER TERM, 1968

ANDREW DYMYTRYSHYN, ET AL., APPELLANTS

v.

P. A. ESPERDY, DISTRICT DIRECTOR OF THE NEW YORK DISTRICT OF THE IMMIGRATION AND NATURALIZATION SERVICE AT NEW YORK, NEW YORK

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

MOTION TO AFFIRM

ERWIN N. GRISWOLD,
Solicitor General,

FRED M. VINSON, JR.,
Assistant Attorney General,

PHILIP R. MONAHAN,
Attorney,
Department of Justice,
Washington, D.C. 20530.

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In the Supreme Court of the United States

OCTOBER TERM, 1968

No. 380

ANDREW DYMYTRYSHYN, ET AL., APPELLANTS

v.

P. A. ESPERDY, DISTRICT DIRECTOR OF THE NEW YORK DISTRICT OF THE IMMIGRATION AND NATURALIZATION SERVICE AT NEW YORK, NEW YORK

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

MOTION TO AFFIRM

Pursuant to Rule 16(1)(c) of the Rules of this Court, appellee moves that the judgment of the district court be affirmed.

STATEMENT

This is a direct appeal from an order of a three-judge district court, entered on July 16, 1968, granting the motion for summary judgment of the District Director of the New York District of the Immigra-

tion and Naturalization Service in an action by appellants, six aliens who are the subjects of unexecuted deportation orders, to enjoin the enforcement of orders for their supervision issued pursuant to Section 242(d) of the Immigration and Nationality Act.

Appellants, all of whom were admitted to the United States for permanent residence many years ago, were ordered deported on different dates between 1951 and 1958 as aliens who, after entry, had been members of the Communist Party.[1] Because of the refusal of their countries of origin to accept them, the Immigration and Naturalization Service has been unable to effect their deportation. (J.S. App. 14, 19; R. 11, pp. 2-4; R. 15, p. 3).[2] Each appellant is, and for years has been, subject to an order of supervision, issued by appellee under Section 242(d) of the Immigration and Nationality Act (8 U.S.C. 1252(d), Appendix, *infra*, pp. 10-11; see J.S. App. 14, 19-21).

Section 242(d) provides that any alien against whom a final order of deportation has been outstanding for more than six months shall, pending eventual deportation, be subject to supervision under regulations prescribed by the Attorney General, which shall include a requirement that the alien appear from time to time before an immigration officer for identification and that he conform to such reasonable restrictions on

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[1] See Section 241(a)(6)(C)(i) of the Immigration and Nationality Act (8 U.S.C. 1251(a)(6)(C)(i)); *Galvan* v. *Press*, 347 U.S. 522; *Rowoldt* v. *Perfetto*, 355 U.S. 115.

[2] "J.S." refers to the Jurisdictional Statement. The record ("R.") is cited by the document number designated, followed, where appropriate, by the page number of the document referred to.

his activities as may be prescribed in his case.[3] Willful failure to comply with such a regulation is a misdemeanor punishable by a fine of not more than $1,000 or imprisonment for not more than one year, or both.

Section 106(a)(6) of the Act (8 U.S.C. 1105a(a)(6), Appendix, *infra*, pp. 11-12) provides that in a criminal proceeding under Section 242(d) the accused may challenge the validity of the deportation order only by separate motion for judicial review made before trial;[4] that if such a motion is made it shall be determined by the court alone, sitting without a jury; that if the accused makes a claim of American nationality presenting a genuine issue of material fact he is entitled to a *de novo* hearing on the issue, but that otherwise the validity of the deportation order is to be determined solely on the administrative record and that the Attorney General's findings of fact, if supported by reasonable, substantial and probative evidence, are to be conclusive.[5]

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[3] The applicable regulation (8 C.F.R. 242.2(d)), aside from designating the local Service officials by whom the supervision is to be exercised (district directors and their deputies), merely incorporates by reference the provisions of the statute.

[4] The pre-trial review authorized may be had only if the deportation order has not already been judicially sustained. The normal method of judicial review is by petition for review in a court of appeals—the procedure prescribed by the principal clause of Section 106(a) (Appendix, *infra*, p. 11). See *Foti* v. *Immigration and Naturalization Service*, 375 U.S. 217; *Cheng Fan Kwok* v. *Immigration and Naturalization Service*, No. 638, Oct. Term, 1967, decided June 10, 1968.

[5] This Court's construction of the "reasonable, substantial, and probative evidence" clause of Section 106(a)(4) of the

The orders of supervision in effect at the commencement of the proceeding at bar required, among other things, that appellants report in person to the Service's New York office on designated dates at three-month intervals and that they not travel beyond the borders of the New York Immigration District (the State of New York) for more than 48 hours without notifying the Service in advance of the dates and places of the proposed travel (R. 11, p. 2; R. 9, exhibits annexed to affidavits).[6]

In the court below, appellants sought injunctive and declaratory relief on the ground that Section 242(d)

Act (8 U.S. C. 1105a(a)(4)) as requiring proof of deportability by "clear, unequivocal, and convincing evidence" (*Woodby* v. *Immigration and Naturalization Service*, 385 U.S. 276) would of course apply with equal force to the identical provision of Section 106(a)(6).

[6] The orders have since been modified, pursuant to a suggestion by the court below at oral argument. As modified, the orders reduce the frequency of the required reports in person from four times to once a year; add New Jersey and Connecticut to New York as the area within which appellants may travel without restriction of any kind; increase from 48 to 72 the number of hours of permissible travel beyond the tri-State unrestricted area without the necessity of notifying the Service; and permit notice to be given, when required, within 72 hours *after* the pertinent period of travel has begun (J.S. App. 19-20). Upon remand by the three-judge court to the single judge for consideration of the non-constitutional issue of the reasonableness of the orders in the light of their purpose to insure the availability of appellants for deportation in the event that deportation becomes possible (see *United States* v. *Witkovich*, 353 U.S. 194), the orders, as modified, were approved (J.S. App. 17, 19-21). Appellants do not press in this Court their previously urged contention that the orders of supervision, both in their original form and as modified, were not reasonably related to that purpose (J.S. 3, 7).

is unconstitutional because, when read in conjunction with Section 106(a)(6), it deprives the accused, in a prosecution for violating an order, of the right to a jury trial on the issue of his deportability, in violation of the Sixth Amendment, and denies him the right to require the government to prove deportability beyond a reasonable doubt, in alleged violation of procedural due process (R. 12, pp. 6-11). Appellants further contended that Section 242(d), as applied to them, is a bill of attainder (R. 12, pp. 12-13).

Holding that appellants lacked standing to raise the Sixth Amendment and due process issues (J.S. App. 15-16), and rejecting on its merits the argument that the challenged statute, as applied, is a bill of attainder (J.S. App. 16-17), the court below granted a motion by appellee for summary judgment (J.S. App. 17-18).

ARGUMENT

1. The court correctly held that appellants lack standing to raise the Sixth Amendment and due process issues posed. The provision appellants attack is essentially a rule of criminal procedure, establishing a standard of proof and delineating the respective provinces of the judge and jury in prosecutions for violation of orders of supervision. Since appellants have neither violated their supervision orders nor asserted any immediate intention of doing so, any criminal prosecutions against them are purely hypothetical. As this Court observed in *United States* v. *Spector*, 343 U.S. 169, which involved a prosecution under a

companion provision to the enactment challenged here,[7] "It will be time to consider whether the validity of the order of deportation may be tried in the criminal trial either by the court or by the jury * * * when and if the appellee [the defendant] seeks to have it tried" (at 172-173). Cf. *Communist Party* v. *Subversive Activities Control Board*, 367 U.S. 1, 70-81.

To hold that appellants have standing to raise these questions would open every rule of criminal procedure to attack by anyone, on the theory that a hypothetical criminal prosecution against him might some day be governed by such rule. Appellants' claim is no less premature than would be, for example, the claim of a selective service registrant that his induction into the Army should be enjoined because in a prosecution for violating the induction order he would be refused a jury trial on the propriety or validity of his draft classification, or the claim of one summoned to appear before a congressional committee that his subpoena should be quashed because in a prosecution for refusing to answer the committee's questions the court

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[7] Section 20(c) of the Immigration Act of 1917, as amended (8 U.S.C. (1946 ed., Supp. IV) 156 (c)), now Section 242(e) of the Immigration and Nationality Act (8 U.S.C. 1252(e)), providing for the punishment of any alien (of designated classes) against whom a final order of deportation is outstanding and who wilfully fails or refuses to make timely application for travel or other documents necessary to his departure.

and not the jury would judge the pertinency of the questions to the subject under inquiry.[8]

Since appellants are not challenging the validity of the orders of supervision *per se*, but are merely attempting to question the procedures that would be used at a criminal trial if they should violate the orders, the present case is clearly distinguishable from *Barton* v. *Sentner*, 353 U.S. 963, affirming *Sentner* v. *Colarelli*, 145 F. Supp. 569 (E.D. Mo.), and from *Siminoff* v. *Esperdy*, 267 F.2d 705 (C.A. 2). In those cases the challenge was to the restrictions contained in the supervision orders, a matter which was immediately affecting the alien. Similarly distinguishable are cases such as *United Steelworkers* v. *Bagwell*, 383 F.2d 492 (C.A. 4), and *Heckler* v. *Shepard*, 243 F. Supp. 841 (D. Idaho), where the challenge was directed at the validity of a statute which had an immediate "chilling effect" on the exercise of rights protected by the First Amendment. Here, the appellants do not dispute the right of the Attorney General to regulate their conduct by issuing supervision orders or his right to prosecute them for violations of such orders. They attack only the procedures which would be employed at their trials if they were prosecuted, and it is that attack which the court below properly held to be premature.

At all events, appellants' Sixth Amendment and due process arguments are without merit. The contention

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[8] See *Braden* v. *United States*, 365 U.S. 431, 435-437, rejecting, on the merits, a claim that the pertinency issue is for the jury. See, also, *Sinclair* v. *United States*, 279 U.S. 263, 298-299.

that in a prosecution for violating a supervision order the accused has a constitutional right to a jury trial on the issue of the validity of his deportation order is in every respect analogous to the claim of a selective service registrant, in a prosecution for failing to report for induction, that he is entitled to a jury trial on the issue of the propriety of his draft classification. The decisions of this Court have firmly established that there is no such right. *Cox* v. *United States*, 332 U.S. 442, 452-453. Cf. *Estep* v. *United States*, 327 U.S. 114, 121-123; *Falbo* v. *United States*, 320 U.S. 549, 553-555. As noted in the *Cox* case, 332 U.S. at 453, "the constitutional right to jury trial does not include the right to have a jury pass on the validity of an administrative order" (opinion of Mr. Justice Reed, concurred in by Chief Justice Vinson and Justices Jackson and Burton). Cf. *Yakus* v. *United States*, 321 U.S. 414, 444.

2. Relying on *United States* v. *Brown*, 381 U.S. 437, which held that Section 504 of the Labor-Management Reporting and Disclosure Act of 1959 constituted a bill of attainder because it made it a crime for a member of the Communist Party to be an officer of a labor union, appellants contend that Section 242 (d) is a bill of attainder. While *United States* v. *Brown* might have some relevance to the question of the validity of the orders of deportation (since it might be argued that the bill of attainder clause prohibits Congress from making an alien deportable because he becomes a member of the Communist

Party),[9] appellants are not here challenging the validity of the orders of deportation. Accepting, as appellants have in this proceeding,[10] the validity of the deportation orders, the orders of supervision at issue here have no effect on appellants' membership in the Communist Party. Since appellants can join or continue in the Communist Party without violating the supervision orders, the holding of the court in *United States* v. *Brown* is wholly inapposite to the case at bar. Here, appellants' membership in the Communist Party does not subject them to any different treatment from that accorded to all other deportable aliens whose deportation can not be effected immediately.

CONCLUSION

It is respectfully submitted that the judgment of the court below should be summarily affirmed.

ERWIN N. GRISWOLD,
Solicitor General.

FRED M. VINSON, JR.,
Assistant Attorney General.

PHILIP R. MONAHAN,
Attorney.

SEPTEMBER 1968.

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[9] But see *Galvan* v. *Press*, 347 U.S. 522, holding that this clause of the Constitution does not apply to deportation.

[10] Appellant Tormey is challenging the validity of her deportation order in a separate case which is presently before the Court. *Tormey* v. *Immigration and Naturalization Service*, No. 122, this Term.

APPENDIX

Section 242(d) of the Immigration and Nationality Act, 66 Stat. 211, as amended by the Act of September 3, 1954, § 17, 68 Stat. 1232 [12] (8 U.S.C. 1252 (d)), provides:

> (d) Any alien, against whom a final order of deportation as defined in subsection (c) heretofore or hereafter issued has been outstanding for more than six months, shall, pending eventual deportation, be subject to supervision under regulations prescribed by the Attorney General. Such regulations shall include provisions which will require any alien subject to supervision (1) to appear from time to time before an immigration officer for identification; (2) to submit, if necessary, to medical and psychiatric examination at the expense of the United States; (3) to give information under oath as to his nationality, circumstances, habits, associations, and activities, and such other information, whether or not related to the foregoing, as the Attorney General may deem fit and proper; and (4) to conform to such reasonable written restrictions on his conduct or activities as are prescribed by the Attorney General in his case. Any alien who shall willfully fail to comply with such regulations, or willfully fail to appear or to give information or submit to medical or psychiatric examination if required, or knowingly give false information in relation to the requirements of such regulations, or knowingly violate a reasonable restriction imposed upon his conduct or activity, shall be fined

[12] The 1954 amendment merely eliminated the characterization of the defined offense as a felony.

not more than $1,000 or imprisoned not more than one year, or both.

Section 106(a)(6) of the Immigration and Nationality Act, 75 Stat. 651-652 (8 U.S.C. 1105a(a)(6)), provides:

> (a) The procedure prescribed by, and all the provisions of the Act of December 29, 1950, as amended (64 Stat. 1129; 68 Stat. 961; 5 U.S.C. 1031 et seq. [now 28 U.S.C. (Supp. III) 2341-2351], shall apply to, and shall be the sole and exclusive procedure for, the judicial review of all final orders of deportation heretofore or hereafter made against aliens within the United States pursuant to administrative proceedings under section 242(b) of this Act or comparable provisions of any prior Act, except that—
>
> * * * *
>
> (6) if the validity of a deportation order has not been judicially determined, its validity may be challenged in a criminal proceeding against the alien for violation of subsection (d) or (e) of section 242 of this Act only by separate motion for judicial review before trial. Such motion shall be determined by the court without a jury and before trial of the general issue. Whenever a claim to United States nationality is made in such motion, and in the opinion of the court, a genuine issue of material fact as to the alien's nationality is presented, the court shall accord him a hearing de novo on the nationality claim and determine that issue as if proceedings had been initiated under the provisions of section 2201 of title 28,

United States Code.[13] Any such alien shall not be entitled to have such issue determined under section 360(a) of this Act[14] or otherwise. If no such hearing de novo as to nationality is conducted, the determination shall be made solely upon the administrative record upon which the deportation order is based and the Attorney General's findings of fact, if supported by reasonable, substantial and probative evidence on the record considered as a whole, shall be conclusive. If the deportation order is held invalid, the court shall dismiss the indictment and the United States shall have the right to appeal to the court of appeals within thirty days. The procedure on such appeal shall be as provided in the Federal rules of criminal procedure. No petition for review under this section may be filed by any alien during the pendency of a criminal proceeding against such alien for violation of subsection (d) or (e) of section 242 of this Act;

* * * *

[13] 28 U.S.C. 2201 establishes the general jurisdiction of courts of the United States to make declaratory judgments.

[14] Section 360(a) of the Immigration and Nationality Act (8 U.S.C. 1503(a)) provides for a special procedure whereby persons claiming rights as nationals of the United States who are denied such rights by a federal department or official may sue to have themselves declared nationals.

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SUPREME COURT OF THE UNITED STATES

October Term, 1968.

DYMYTRYSHYN ET AL. *v.* ESPERDY, DISTRICT DIRECTOR, ETC.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK.

No. 380. Decided October 21, 1968.

PER CURIAM.

The motion to affirm is granted and the judgment is affirmed.